APPENDIX A

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, OHIO

No. 21843

EARL LEROY SCOTT AND ESTHER SCOTT CRONE, *Plaintiffs*,

vs.

HERBERT WILSON, *Defendant*.

Decision

KIRK, J. (sitting by assignment)

The objections to the introduction of evidence reserved for decision are now each overruled.

Plaintiffs Scott and Crone by their petition seek to quiet title to 47 acres of land as against defendant Wilson. Defendant Wilson by answer sets up several defenses based upon facts which will be set out hereafter and claims to be the owner of an undivided one-third of the land in fee simple and by cross-petition seeks an accounting of rents and partition. Plaintiffs' reply and answer raises no additional issues.

By quit-claim deed dated April 3, 1906, John B. McLean conveyed the land and other real property to his daughter Estella B. Scott for a stated consideration of one dollar, love and affection, the granting clause being "does hereby remise, release and forever quit claim to the said Estella Scott for and during her natural life and remainder to the heirs of her body their heirs and assigns forever" and the habendum clause being "to have and to hold the same to the only proper use of the said Estella Scott for and during her natural life and remainder to the heirs of her body their heirs and assigns forever."

This deed was delivered to a third party with instructions that it be delivered to Estella Scott at the death of the grantor which was done.

Subsequent to the execution of the deed and its delivery to the third party, McLean executed a will by which he devised the land "to my daughter Estella Scott of Columbus, Ohio, for and during her natural life, with remainder after said life estate over to her children and their heirs." And by a later will he devised a life estate in the land to his wife with remainder to his "three grandchildren, Flossie Scott, Esther Scott and Earl Scott, children of my daughter Estella M. Scott, their heirs and assigns forever."

Due to some question of his domicile both wills of John B. McLean were admitted to probate, the earlier will in Franklin County and the later will in Fayette County.

At the date of the death of John B. McLean in 1916, Estella Scott was living and had three children living, Flossie, Esther and Earl, the latter two being the plaintiffs here.

In 1917 a petition was filed in this court on behalf of Esther M. Scott and her three children, wherein it was averred that "the plaintiff, Estella M. Scott, is the owner of an estate for the term of her life" in the land in question, "and in possession thereof; and that said plaintiffs Flossie M. Scott, Esther Scott and Earl E. Scott, are the owners of the estate in remainder in said lands after the termination of said life estate of the said Estella M. Scott." "The said plaintiff, Earl E. Scott, is a minor and prosecutes this suit by Estella M. Scott, his mother and next friend." The defendants in that action were the widow, the executors under each will and two other beneficiaries under the wills.

The petition in that cause sets out the deed from McLean in 1906, reciting that it conveyed to Estella M. Scott "an estate for the term of her life in said premises and to the heirs of her body an estate in remainder therein in fee simple." It also set out the two wills, averring that the testator was incompetent when he executed the second.

The prayer of the petition was that plaintiffs title to said real estate be quieted. The petition was signed and verified by an attorney for plaintiffs and not by any of the plaintiffs personally.

The defendants demurred to the petition. By entry the court overruled the demurrer, the entry reciting that the defendants did not elect to plead further. The entry continued by reciting that the court found in favor of the plaintiffs and that they are entitled to the relief asked in the petition and that "It is therefore ordered and adjudged that the title of said plaintiffs in and to the said lands described in their petition be and it is hereby forever quieted in said plaintiff Estella M. Scott, for and during the term of her natural life, and in said plaintiffs Flossie M. Scott, Esther Scott and Earl E. Scott after the determination of the life estate of Estella M. Scott in fee simple in remainder against any claim or demand of said defendants or either of them."

Flossie Scott married one Clarence E. Wohlheter. She died in 1931 leaving a will by which she devised to her husband who survived her "all real estate of which I may die seized of, my share in the farm known as the John B. McLean, Washington C. H. Ohio now owned by Estella McLean Scott."

Estella M. Scott died in 1948 survived by the present plaintiffs her son and daughter.

In 1953 Clarence E. Wohlheter conveyed his interest to the defendant Wilson by quit claim deed.

As the rule in Shelley's case was not abolished as to deeds in Ohio until 1941, it may be interesting to speculate as to the effect of the conveyance by deed of 1906 from McLean. Plaintiffs contend that it conveyed a fee tail. The defendant denies that it had that effect.

The classical examples of applications of the rule are that a conveyance to "A for life with remainder to his

heirs" creates a fee simple in A and that to "A for life with remainder to the heirs of his body" creates a fee tail. But at bar we have a conveyance to "A for life with remainder to the heirs of her body *their heirs and assigns forever*" (emphasis added). Does this then prevent the operation of the rule by a showing that the words "heirs of the body" were after all to be construed as words of inheritance since fresh limitations were grafted thereon by the addition of well established words of limitation, namely "their heirs and assigns forever"? See 36 O. Jur. 609. And, accordingly, would not the conveyance be one of a life estate with contingent remainder in the heirs of the body of the life tenant in fee simple?

If it were necessary to classify with nicety the estates created by the deed of 1906 the court would be inclined toward the latter interpretation. However, under the facts as they exist, the ultimate effects of each of the three interpretations mentioned are the same.

If the conveyance amounted to a conveyance of a fee simple in Mrs. Scott, it would pass to her surviving children, the plaintiffs, as her heirs at law under intestate succession and the husband of the daughter Flossie who died several years before the death of the mother would take nothing under the will of Flossie. If the deed conveyed a fee tail the effect would be the same. Dungan vs. Kline, 81 O. S. 371. And, again, if the conveyance were to be construed as granting a life estate with remainder to the heirs of the body of the life tenant in fee, the remainder would be conditional upon the life tenant's leaving heirs of the body and as no one has heirs while living, the fee would vest in the surviving children of Mrs. Scott and again, as Flossie had no interest subject to alienation in her lifetime, she could devise no interest by her will.

But the defendant contends that the effect of the conveyance of 1906 has been altered by the litigation of 1917

and the judgment therein. It is urged that the interests of the parties to that action were determined and that the present controversy is res judicata; that Flossie acquires a vested remainder in fee simple subject to the life estate in her mother by the judgment in that case—a title by judgment—and that the present plaintiffs are estopped to deny the defendant's title by reason of that litigation.

The question of the estates of the plaintiffs inter sese was not in issue in the litigation of 1917, and therefore, any judgment purporting to fix and determine those interests inter sese would be a nullity. Consequently no title could be derived from such a judgment nor could it be the basis of an estoppel.

Nor could the averments of a petition filed on behalf of Mrs. Scott and her children as plaintiffs, one of whom was a minor, signed and verified by an attorney and not by any one of the plaintiffs be the basis of an estoppel as between such plaintiffs.

In passing, it would seem that the court's decision in the litigation of 1917 must have been based on the effective legality of the deed, rather than on the effectiveness of either will as a conveyance, since the second will would have revoked the first and the validity or invalidity of either will could not have been adjudicated on demurrer.

Defendant further contends that plaintiffs should not be permitted to maintain this action because of a previously filed action in this court in which the Fayette County Agricultural Society sought to appropriate the land and in which the parties here were defendants, on the theory that the court in such case would determine the rights of the parties in making any distribution of the price paid by the society for the land. However, another judge sitting in this court, after hearing that cause, denied the society the right of appropriation. The appeal of the society is now pending.

Although the court is not aware of any authority directly in point since the adoption of the present appellate procedure, it would seem that until that judgment of the trial court is reversed on appeal, it remains as a judgment, where the appeal is on law and not on law and fact.

And under the judgment denying the right to appropriate, of course, there would be no question of distribution of the proceeds of sale. The court does not feel that the defense of other suit pending has been sustained by the defendant. Moreover, defendant here by cross-petition seeks an accounting of rents. Such a question could not be decided in the appropriation case in any event.

In view of the foregoing, it is not necessary for the court to pass on other issues of the case argued in the briefs.

The prayer of the petition will be granted and that of the cross-petition denied with plaintiffs recovering their costs. An entry accordingly will be prepared by counsel for plaintiffs, submitted to counsel for defendant and thereafter to the court.

April 12, 1955.

KIRK
Judge

APPENDIX B

IN THE COURT OF APPEALS, FAYETTE COUNTY, OHIO

No. 279

EARL LEROY SCOTT, et al., *Plaintiffs-Appellees*

vs.

HERBERT WILSON, *Defendant-Appellant*

and

EDITH SCOTT, et al., *Defendants-Appellees.*

Opinion

Rendered on the 8th day of November, 1955.

APPEARANCES:

MR. CARRINGTON T. MARSHALL, 218 North Parkview, Columbus, Ohio,

For Plaintiffs-Appellees.

BROWNFIELD & MALONE, Broad Street, Columbus, Ohio,

For Defendant-Appellant.

CONN, J., of the Sixth District sitting by assignment:

This is an appeal by defendant on questions of law from a judgment rendered by the common pleas court in favor of plaintiffs-Appellees and against defendant-appellant.

This action was brought to quiet title to a parcel of real estate consisting of 47,033 acres in Union Township, Fayette County, adjoining the city limits of Washington Court House, and described in plaintiff's petition by metes and bounds. Issues were raised on the petition, the answer and cross-petition of defendants and the reply of plaintiffs.

Plaintiffs allege that they are now and for a long time have been in possession of said real estate; that they have title in fee simple to said land as tenants in common; that defendant claims on undivided one-third interest therein, which claim of defendant is without any right whatever.

Plaintiffs pray that their title and possession of said property be quieted and that defendant be forever barred from having any right, title or interest therein.

The claims of possession and fee simple title set forth in the petition of plaintiffs are specially denied by defendant.

In the second and third defenses, as designated, defendant alleges that at the time plaintiffs began their action there was another action pending wherein the identical issue in this case must and will be determined.

Defendant further alleges that on or about July 9, 1917, Estella M. Scott, et al. filed her petition in the common pleas court, cause No. 14696, and that in said action it was adjudged by the court that Estella M. Scott (now deceased) held a life estate in the premises described in plaintiff's petition and that Flossie M. Scott, Esther Scott and Earl E. Scott held the remainder estate in said property in fee simple. It is further alleged in substance that Flossie M. Scott married one Clarence E. Wohlheter (defendants predecessor in title); that Flossie Scott Wohlheter died testate on November 20, 1941, and by the terms of her will she devised to her husband an undivided one-third interest in fee simple in said real estate; that thereafter Clarence E. Wohlheter conveyed by deed an undivided one-third interest in fee simple to the defendant herein.

That said judgment in cause No. 14696 was entered on the merits of the case; that the interests of the plaintiffs herein and defendant's predecessor in ti in the real estate described in the petition in said cause, including the premises described in plaintiff's petition here, constituted the sole issue in said action and that said judgment is res judicata and binding on the parties hereto.

Defendant in his cross-petition alleges he is seized in fee simple of an undivided one-third of said real estate and seeks an accounting for rents and profits.

The affirmative allegations in defendants' answer are denied by plaintiffs in their reply. The further averments therein are argumentative and evidentiary in character and do not appear to raise any affirmative issues.

The evidence offered at the trial is almost exclusively documentary and free from conflict.

The evidence discloses that one John R. McLean (unmarried) conveyed by deed to his daughter, Estella Scott, also known as Estella M. Scott, a life estate in a large tract of land in Union Township, Fayette County, Ohio, including the premises described in plaintiffs' petition, and the remainder to the heirs of her body, their heirs and assigns. The language creating the life estate and the limitation over is found in both the premises of the deed and in the habendum clause.

January 2, 1917, Estella M. Scott, Flossie M. Scott, Esther Scott and Earl E. Scott, a minor by Estella M. Scott, his next friend, as plaintiffs, brought an action to quiet title to said lands in the common pleas court, cause No. 14696, against Mary E. McLean, D. R. McLean as executor of the estate of John B. McLean, Benjamin R. Barbee, as executor of the estate of John R. McLean, deceased, Barzillai O. McLean and Zenas B. McLean, as defendants.

A transcript of the case was introduced and received in evidence upon the trial in the instant case. The finding and judgment are set up in the third defense of defendants' answer herein.

The record is lengthy and includes the pleadings, amendments thereto, motions and special demurrer addressed to plaintiffs' petition, as amended, and the finding and judgment of the court.

In view of plaintiffs' contention, we deem it necessary to set forth in some detail the issues raised on the pleadings and evidence. The allegations in plaintiffs' petition, material here, are as follows: Plaintiffs allege that on April 3, 1906, John M. McLean, unmarried, conveyed by duly executed deed a life estate in certain lands in Union Township, Fayette County, including the premises described in plaintiffs' petition in the instant case, to Estella M. Scott for life and to the heirs of her body an estate in remainder therein in fee simple; that subsequently to the execution of said deed, John R. McLean intermarried with one Mary F. McLean; that John R. McLean died May 26, 1916, leaving a last will and testament dated July 24, 1914, in which he devised the real estate in question to Estella M. Scott for life and the remainder to her children in fee simple; that said will was duly admitted to probate and recorded in the probate court of Franklin County, Ohio; and that defendant Benjamin R. Barbee was appointed executor of said estate.

That thereafter said John R. McLean sustained a serious head injury, and became incapacitated and was adjudged an imbecile; that a guardian was appointed and thereafter, on December 29, 1915, said ward executed a paper writing which was admitted to probate and recorded in the probate court of Fayette County, as the last will and testament of said John R. McLean; that Item IV of said will purports to give and devise to Mary F. McLean for her natural life 47 acres of land, known as the Washington Court House Fair Grounds, and after her death to the three grandchildren of deceased, Flossie Scott, Esther Scott and Earl Scott, and to their heirs and assigns; that Item V of said pretended will purports to give 230 acres of land to his daughter, Estella M. Scott, during her natural life, and at death to her three children absolutely and in fee simple.

It is further alleged that plaintiff Estella M. Scott is the owner of a life estate in said land and in possession

thereof, and that plaintiffs Flossie M. Scott, Esther Scott and Earl E. Scott are owners of the estate in remainder; that each of said executors claim the right to administer said estate; that defendants, Mary R. McLean, et al., claim some interest in said lands as beneficiaries under said respective wills; and that all of the claims of said defendants are adverse to the rights of plaintiffs and constitute a cloud upon their title to said real estate.

It further appears that service of summons was made on each of said defendants; that leave was granted plaintiffs to file an amended petition making the Fayette County Fair Co., and Charles Sargent parties defendant, and setting up certain claims for rentals, which are not important here.

Other proceedings were had in making up the issues in the case, containing eight specifications to strike and to separately state and number, which motion was overruled.

Thereupon, defendants Mary F. McLean and D. R. McLean, as executor, demurred specially to plaintiffs' petition and amendment thereto, alleging among other things that the petition of plaintiffs does not state facts constituting a cause of action. The trial court found the demurrer not well taken and overruled same.

Thereupon "said cause was submitted to the court upon the pleadings and the evidence, and representations and admissions of fact on behalf of said parties." The court found in favor of plaintiffs "and that they are entitled to the relief asked for in said petition." Judgment was entered quieting the title of plaintiff Estella M. Scott in and to said lands, for the term of her natural life, and in said plaintiffs, Flossie M. Scott, Esther Scott and Earl E. Scott in fee simple in remainder, against the claims of said defendants. The Fayette County Fair Co. and Charles Sargent were enjoined from asserting any interest in said real estate.

In the instant case, further documentary evidence was received as follows: A certified copy of the will of Flossie Scott Wohlheter, dated August 13, 1930, wherein it appears that said testatrix devised all her real estate, including her share in the John B. McLean farm to Clarence E. Wohlheter; also the certificate of transfer of said real estate to said devisee; also a certified copy of the quit claim deed of Clarence E. Wohlheter to the defendant Herbert Wilson, for the real estate described in plaintiff's petition; also the assignment to said grantee of certain rents and claims; certified copies of said wills of John B. McLean were introduced in evidence. Some further documentary evidence was received in evidence, but we do not regard it as being material in the determination of the issues presented on the record.

Alleged errors of the trial court are assigned and chiefly relied on by defendant in oral argument and brief are grounded on the claim that its judgment amounts to a collateral attack on the judgment in the earlier action, cause No. 14696, and that said judgment is res judicata; also that the court erred in finding that defendant has no interest in said property and in dismissing defendant's cross-petition.

We have given careful consideration to the issues raised on this appeal, and particularly to the claim that the trial court's judgment is a collateral attack on the judgment in cause No. 14696.

The evidence discloses, and it is not disputed, that the court had jurisdiction of the subject matter of the action and of the parties. The evidence discloses no irregularity in the proceedings and none is claimed.

For purposes of the demurrer, it admitted all facts well pleaded. No application was made to plead further, and thereupon the cause was submitted and the court adjudicated the issues in favor of plaintiffs and entered judgment as prayed for. As already pointed out, the

court determined that Estella M. Scott had an estate for life in said lands and that plaintiffs, Flossie M. Scott, Esther Scott and Earl A. Scott, had remainder estates in fee simple.

No appeal was taken from this judgment, nor does it appear that said judgment had ever been subject to direct attack. Under these circumstances, defendant claims that the rule inhibiting collateral attack against judgments regularly entered is applicable, and that on the whole record no successful attack on the validity of the judgment can be made in this action.

Plaintiffs contend that in view of the character of the proceedings in the earlier case, cause No. 14696, the trial court was without authority to find and adjudge that plaintiffs Flossie M. Scott, Esther Scott and Earl E. Scott had fee simple estates in remainder; and that the doctrine of res judicata does not apply. The predicate for this claim, as presented by the distinguished counsel for plaintiffs, deserves careful examination.

Three answers are suggested to defendant's contention and it is claimed that any one is conclusive.

First, Flossie, Esther and Earl were neither necessary nor proper parties. We will first consider the merits of this claim of plaintiffs.

The Code provides that an action must be prosecuted in the name of the real party in interest (Sec. 2307.05, R. C.), and that all persons having an interest in the subject matter of the action may be joined as plaintiffs (Sec. 2307.18, R. C.).

This latter section in its terms is not mandatory, as it relates to persons who are not united in interest but who have any legal or equitable interest in the subject of the action and in obtaining the relief demanded.

See Clark, Exec., et al. v. The McLain Fire Brick Co., 100 Ohio St., 110; 30 O. J., 750, Sec. 36.

We call attention to Sec. 5303.01 R. C. which authorizes a person out of possession, who claims an interest in remainder or reversion to maintain an action to determine his interest therein. The joinder of the life tenant and her children as parties plaintiff accords with this section of the Code.

It is in point to note that an issue of defect of parties may be raised by demurrer. As pointed out above, the demurrer of defendants was overruled. The court by its judgment determines issues. Issues are raised on the pleadings and the evidence. In the instant case, the trial court not only had before it the deed of John R. McLean, but also his subsequent will (the validity of which was not challenged), which devised to the three children of the life tenant estates in remainder in fee simple. In our opinion, the children of the life tenant were necessary parties to the action in cause No. 14696, in view of their interest in the subject matter, and the contention of plaintiffs should not be sustained.

Assuming that the contention of plaintiffs were sound and that said children of the life tenant, under the limitation in the deed, had an expectancy, a mere possibility only, such conclusion would not be decisive as the trial court had before it the valid will of John R. McLean, wherein said testator had devised to said three children estates in remainder in fee simple.

In view of our conclusion that the children of the life tenant were proper and necessary parties in cause No. 14696, and that the pleadings and the evidence put in issue the right, title and interest of said children respectively, each having an equal share in and to the estate of their grandfather, John R. McLean, it follows that the second and third questions, to wit: that no issue was joined between Flossie and her sister and brother and that Sec. 10512-4 G. C. (now Sec. 2131.04 R. C.) did not become effective until after the death of Flossie, are

each unrelated to said judgment in the early case and are untenable.

It is also contended by plaintiffs that the quiet title suit brought by Clarence E. Wohlheter against the defendant, Estella M. Scott, June 23, 1934, cause No. 18145, wherein the court found that said defendant had a life estate in said property and quieted her title thereto against plaintiff is decisive of the case at bar. The remainder interests were not involved in this action.

Plaintiffs also claim that any possible claim of Wohlheter and of defendant in the instant case was barred by the statute of limitations. If our conclusion be correct that the judgment in cause No. 14696 is not subject to collateral attack and is res judicata, said claims of plaintiffs are clearly untenable.

It is our conclusion that the judgment of the trial court in cause No. 14696 adjudged the right, title and interest of plaintiffs respectively in that action; that the remainder interest in fee simple of each of the three children was vested, and that said judgment is res judicata.

In view of our conclusion, no consideration need be given to other assignments of error.

Without extending this discussion further, and in view of the whole record, the judgment of the trial court should be reversed and this cause remanded to the trial court for further proceedings according to law.

Reversed and remanded.

Miller, P. J. and Hornbeck, J., Concur.

IN THE COURT OF APPEALS OF FAYETTE COUNTY, OHIO

No. 279

Filed Nov. 21st, 1955

EARL LEROY SCOTT AND ESTHER SCOTT CRONE,
Plaintiff-Appellees,

vs.

HERBERT WILSON, *Defendant-Appellant,*

and

EDITH SCOTT AND HARRY CRONE, *Defendant-Appellees.*

Entry

The parties appeared by their attorneys and this cause came on to be heard upon appeal on questions of law, original papers, assignments of error, bill of exceptions, transcript of the docket and journal entries in the Court of Common Pleas of Fayette County, Ohio, and briefs, and was argued by counsel and submitted to the Court.

Upon consideration whereof, this Court finds that in the record and proceedings aforesaid, being Cause No. 21843 on the docket of the Court of Common Pleas of Fayette County, Ohio, there is error manifest upon the face of the record to the prejudice of the Defendant-Appellant, in this, to-wit:

> That the court below should have found and adjudged that Cause No. 14696 on the docket of the Court of Common Pleas of Fayette County, Ohio, adjudged the right, title and interest of Plaintiff-Appellees and Flossie Scott, Defendant-Appellant's predecessor in title, in the real estate concerned therein; that the undivided one-third (⅓) remainder interest of each of said persons was vested; that said judgment is res judicata and cannot be collaterally attacked; that the

Petition of Plaintiff-Appellees should be dismissed; and that the prayer of Cross-Petition of Defendant-Appellant should be granted.

It is therefore considered, ordered and adjudged by this Court that the said judgment and proceedings of the Court of Common Pleas of Fayette County, Ohio in said Cause No. 21843, be and the same is hereby reversed and held for naught, and that this cause be and the same is hereby remanded to said Court of Common Pleas for further proceedings in accordance with this judgment, the opinion of this Court and the law.

It is further ordered that the said Plaintiff-Appellees pay the costs of this appeal taxed at $....., and, in default thereof, that an execution issue therefor.

It is further ordered that a special mandate be sent to the Court of Common Pleas of Fayette County, Ohio, to carry this judgment into execution.

To all of which Plaintiff-Appellees except.

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.....

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Approved:

.....

BROWNFIELD & MALONE
Attorneys for Defendant-Appellant

.....

CARRINGTON T. MARSHALL
Attorney for Plaintiff-Appellees

APPENDIX C

THE STATE OF OHIO, CITY OF COLUMBUS
THE SUPREME COURT OF THE STATE OF OHIO,
Of the Term of January, A.D. 1956
To-wit: Wednesday, February 8, 1956

Filed Court of Appeals, Fayette County, Ohio, April 27, 1956.

DOROTHY L. WEST,
Clerk

No. 34670

EARL LEROY SCOTT, et al., *Plaintiffs-Appellants*

vs.

HERBERT WILSON, *Defendant-Appellee*

Motion for an Order Directing the Court of Appeals of Fayette County to Certify Its Record

It is ordered by the Court that this motion be, and the same hereby is, overruled.

THE STATE OF OHIO, CITY OF COLUMBUS
THE SUPREME COURT OF THE STATE OF OHIO,
Of the Term of January, A.D. 1956
To-wit: Wednesday, February 29, 1956

No. 34670

EARL LEROY SCOTT AND ESTHER SCOTT CRONE,
Plaintiffs-Appellants

vs.

HERBERT WILSON, *Defendant-Appellee*

Application for Rehearing

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

Supreme Court, U.S.
FILED
AUG 16 1956
JOHN T. FEY, Clerk

No. 100.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

EARL LEROY SCOTT, AND HARRY D. OBONE, EXECUTOR ESTATE OF ESTHER SCOTT OBONE, DECEASED,

Petitioners,

vs.

HERBERT WILSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

[illegible]
[illegible]
[illegible]
Counsel for Respondent.

[illegible]
Of Counsel.

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IN THE

upreme Court of the United States

OCTOBER TERM, 1956.

No. 100.

ARL LEROY SCOTT, AND HARRY D. CRONE, EXECUTOR ESTATE OF ESTHER SCOTT CRONE, DECEASED,

Petitioners,

vs.

HERBERT WILSON,

Respondent.

RIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

QUESTIONS PRESENTED.

The actual issues in the courts below were quite simple. ne legal rules governing these issues have been pro-unced by the Ohio courts and are not open to question.

The Ohio Court of Appeals simply applied the well settled Ohio law to the facts, which are complicated but almost wholly free from dispute. In any event no federal question has at any time been involved, urged or passed upon by any court below.

The questions of law involved are as follows:

1. As a matter of Ohio law, can a 1917 judgment of the Court of Common Pleas of Fayette county, Ohio, which was never appealed and was never reformed or vacated, be collaterally attacked in 1954 in an action in that same court between parties and privies to parties to the original action?

2. Can the Ohio statute of limitations run against a remainderman prior to the termination of an intervening life estate?

These were the true issues presented to the Ohio Court of Appeals, are the questions decided by that court and are the only ones actually present in the case. The questions presented in the petition fail squarely to acknowledge and meet the true issues, as follows:

(a) No federal or constitutional question has at any point prior to the petition for writ of certiorari been urged by petitioners or passed upon by any court.

(b) Both courts below held that there were no fee tail estates involved here, and no court has ever held that there were from the 1917 judgment to date. This case presents no question of a remainder in fee tail being alienable or devisable (p. 4a, Appendix A; p. 14a, Appendix B).

(c) There can be no question concerning the applicability of statutes of limitations, since, as the Ohio Court of Appeals held, statutes of limitations do not begin to run against a remainderman until an intervening life estate has terminated.

STATEMENT OF CASE.

Petitioners' statement of the facts deviates from the record in a number of particulars, omits relevant matters and includes numerous legal conclusions and inferences contrary to the facts as found by the courts below. With the following corrections, additions and modifications we are in general agreement with the facts stated by petitioners:

(a) The April 3, 1906, deed was not a conveyance of fee-tail estates. Furthermore, the deed was not delivered at the time of its execution, but was placed with other persons for delivery after the death of grantor.

(b) The dispute leading to the 1917 action, Cause No. 14696, was not merely between the widow of John B. McLean and his daughter. His grandchildren, petitioners and their since deceased sister, Flossie Scott, were parties plaintiff to the resulting action. To state that the daughter's claim was based on the deed of April 3, 1906, is incorrect, for although in their petition Estella M. Scott and her three children mentioned the deed of April 3, 1906, they also alleged that the first will of July 24, 1914, was the valid last will of John B. McLean. Estella M. Scott and her three children at no time claimed that their interests were interests in fee tail, but they specifically claimed that Estella had a life estate and that each of the three children owned a remainder in fee simple. Of course no guardian *ad litem* was ever appointed for the minor plaintiff, Earl Leroy Scott, since this procedure is only resorted to in Ohio when a minor is a party defendant. When a party plaintiff, the minor sues by a next friend, as here.

The 1917 judgment in Cause No. 14696 did not find that the deed prevailed. Without stating from which of several

possible sources title was derived, that judgment specifically determined and quieted title in Estella M. Scott for her life and in Flossie M. Scott, Esther Scott and Earl E. Scott in fee simple in remainder after the determination of the life estate of Estella M. Scott, just as those parties had requested the court to hold. This the Ohio Court of Appeals held to be binding on each of the named parties.

On the same day as the judgment in Cause No. 14696 was entered, the same court entered judgment in Cause No. 14760 (an action to contest the second will dated December 29, 1915, between the same parties involved in Cause No. 14696, and others) sustaining the will of December 29, 1915.

The 1917 judgment in Cause No. 14696 was never appealed and no party has ever attempted to have it reformed or vacated.

(c) Flossie Scott Wohlheter specifically devised her undivided one-third remainder in fee simple in the involved 47 acres to her husband, Clarence, and the Probate Court of Franklin county, Ohio, ordered it transferred to him.

(d) Clarence Wohlheter asked no relief against the petitioners here in Cause No. 18145, but prayed that his title be quieted against Estella M. Scott (the life tenant) only, who answered alleging that she owned a life estate as determined by Cause No. 14696 and that the judgment in that action was *res judicata*. The judgment in Cause No. 18145 quieted the title of Estella M. Scott against Clarence Wohlheter "for and during her natural lifetime."

(e) The constitutional question alleged to be presented has never been raised in any manner in this action prior to the filing of this petition for writ of certiorari. Contrary to the statement at page 11 of the petition, the alleged

constitutional question was not raised by assignments of error filed in the Supreme Court of Ohio, as no assignments of error were ever filed in such court. Under the Ohio practice, it is customary to take an appeal as of right to the Ohio Supreme Court when a constitutional question is claimed. The petitioners failed to do so here, but instead filed their motion to certify in that court merely alleging questions of public and great general interest without mention of any constitutional question.

REASONS FOR NOT GRANTING THE WRIT.

I.

The Federal Question Alleged to be Presented Was Not Raised in or Passed Upon by Any State Court.

The principle that federal constitutional questions must be raised in state courts before they will be considered by this Court is too well established to require citation. The petition for writ of certiorari raises the alleged federal question for the first time, and neither of the three (3) Ohio courts ever passed upon such question. This Court has consistently held, as a jurisdictional matter, that a writ of certiorari to a state court will be dismissed when the record, as here, fails to show that the federal question indicated in the petition for the writ was raised or passed upon below. *White River Co. v. Arkansas*, 279 U. S. 692, 73 L. Ed. 903; *Missouri Pacific Railroad Co. v. Hanna*, 266 U. S. 184, 69 L. Ed. 235.

II.

No Federal Question Has Been Presented to This Court.

Petitioners' claims may be stated as follows:

(a) The court below, in holding that the 1917 judgment was *res judicata* so as to deny their claim of complete ownership of the real estate, erred and thus deprived them of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(b) The court below committed other errors.

All errors alleged to have been committed were errors in the application of or refusal or failure to apply what petitioners consider to be the correct Ohio law to the facts of the case. No claim is made that any Federal statutes or treaties are involved, and the only claim involving the Federal Constitution is the one that because of an erroneous judgment petitioners have been denied due process of law.

This Court has on a number of occasions held such contentions to be without merit. Mere error, if any, of a court in a judgment entered after full hearing does not constitute a denial of due process. *Corrigan v. Buckley*, 271 U. S. 323, 70 L. Ed. 969; *Dunbar v. New York*, 251 U. S. 516, 64 L. Ed. 384; *Bonner v. Gorman*, 213 U. S. 86, 53 L. Ed. 709.

In the case of *Tracy v. Ginzberg*, 205 U. S. 170, 51 L. Ed. 755, this Court held:

> "The decision of a state court involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property, without due process of law, simply because its effect is to deny his claim to own such property. The Fourteenth Amend-

ment did not impair the authority of the States to determine finally, according to their settled usages and established modes of procedure, such questions, when they do not involve any right secured by the Federal Constitution or by any valid act of Congress, or by any treaty."

Petitioners specifically claim that the determination that the 1917 judgment was *res judicata* denied them due process, and imply that failure of the court below to apply prior Ohio law concerning alienability or devisability of remainders in fee tail (even though both courts considering the question held the estates of the various parties were not in tail) had a like result. This Court has decided both contentions to the contrary.

Possible error in a judicial determination that former judgments are *res judicata* in an action concerning title to real estate does not constitute a denial of due process of law. *Jones v. Buffalo Creek Coal Co.*, 245 U. S. 328, 62 L. Ed. 325.

A departure by state decision from a rule of property established by earlier state decisions may not be relied on, without more, as a violation of the Fourteenth Amendment. *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 68 L. Ed. 382; *O'Neil v. Northern Colorado Irrigation Co.*, 242 U. S. 20, 61 L. Ed. 123.

Finally, petitioners urge that respondent is barred by the Ohio statute of limitations. As a matter of Ohio law for a number of reasons this claim has no merit. But assuming that the courts below decided this question erroneously, does the Constitution of the United States prohibit Ohio courts from committing errors in the application of Ohio law to a factual situation? We think not.

CONCLUSION.

The Court of Appeals of Fayette county, Ohio, committed no errors in adjudging that respondent is entitled to an interest in the real estate involved here. Neither that Court of Appeals nor the Supreme Court of Ohio, in overruling petitioners' motion to certify the record or denying petitioners' application for rehearing, has deprived petitioners of their constitutional rights without due process of law.

Not only has no federal question been presented to this Court but the alleged question of violation of due process of law guaranteed by the Fourteenth Amendment is raised in this Court in the first instance. As stated by this Court in *Brinkerhoff-Faris Co. v. Hill,* 281 U. S. 673 (680), 74 L. Ed. 1106:

> "It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court."

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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